

**Remarks**

Claims 1, 13, and 20 are pending in this application and are rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 5,565,316 referred to hereafter as Kershaw in view of U.S. Patent Application Publication No. US 2004/0229199 referred to hereafter as Ashley. The above-identified present patent application has been published as U.S. Patent Application Publication 2004/0221013A1, and references to the specification in this response are in terms of paragraphs of the publication for the Examiner's convenience.

***Claim Rejections Under 35 U.S.C. §103(a) – Kershaw and Ashley***

Claims 1, 13, and 20 are rejected under 35 U.S.C. §103(a) as unpatentable over Kershaw in view of Ashley. Applicants respectfully traverse this rejection. Claim 1 is amended in this response to correct an antecedent basis issue. Remarks below regarding independent claim 1 also apply to independent claims 13 and 20, which differ essentially only in form.

Ashley has an effective priority date of April 16, 2003. The present application was filed on November 13, 2003 but claims priority from provisional application U.S. Ser. No. 60/425,740 filed on November 13, 2002. Thus Ashley is not valid as prior art if the priority claim is valid. The Examiner asserts that the priority claim is not valid as features added to the claims via the immediately previous amendment to more clearly define the invention are not adequately supported in the provisional application - specifically “upon failure of the testing station, the initial state object and the changed state objects stored on the server are used to recreate the examination on the testing station at the point in the examination where the failure occurred” and “the user will not be penalized for the time that questions are not available”. Applicants disagree and address both the enablement and obviousness issues below.

Page 2 lines 28-30 of the provisional application state “**According to another embodiment of the invention, state management may be performed by a computer-based testing system to provide recovery from a failed testing station during administration of a test.**” Page 3 lines 1-3 of the provisional application state “**According to yet another embodiment of the invention, test information caching techniques are utilized to cache questions locally and remotely and to minimize downtime while a test is being administered.**” Page 5 lines 26-28 of the provisional application describe a service center providing services including “**...electronic test administration; item caching, automatic updating of the test taking software 132, fault recover [sic], etc.**” Thus the general concepts of test station failure recovery and concern for downtime are clearly established.

Providing even more detail, page 6 lines 1-7 of the provisional application state “**The holding database 123 stores fault recovery information for a user and also caches test information (e.g., test questions, etc.) received from the backend 130 and test information (e.g., test results, etc.) transmitted to the backend 130. Fault recovery information may include a substantial mirror copy of a current state of a user’s test being administered. State information may include test answers and elapsed testing time for a test currently being administered to a user, for example, on a testing station.**” The “initial state object” (e.g. test questions) and “changed state objects” (e.g. test answers and elapsed testing time) in claim 1 language are clearly identified as being stored for test station failure recovery. Specific reference is made to the “current state of a user’s test being administered”, corresponding definitively to “at the point in the examination” in claim 1 language. Further, “**Elapsed testing**

**time**” is distinctly taught, in contrast to simple total elapsed time which would include “the time that questions are not available” in claim 1 language, to a user’s disadvantage.

Further, page 10 lines 9-22 of the provisional application state **“Therefore, if a testing station, such as one of the testing stations 130a...n, administering a test fails, the test being administered may be recovered from the service center 120. Then, the user can complete the test starting from the state of the test at the time of failure. The test state includes, inter alia, an elapsed test time and a user’s answers. The elapsed test time includes an amount of test taking time that has elapsed from a starting time of a test being administered. The elapsed test time takes into consideration any amount of time that a test is unavailable to the user while the test is being administered. For example, portions of the test may be downloaded during administration of the test. Due to transmission latency, questions may not be available to the user. If the user is allotted a predetermined amount of time to take the test, the user will not be penalized for the time the questions are not available to the user. Also included in the test state are the user’s answers. This includes any answer the user has entered.”** The specification language **“the user can complete the test starting from the state of the test at the time of failure”** very clearly corresponds to claim 1 language “upon failure of the testing station, ... used to recreate the examination on the testing station at the point in the examination where the failure occurred”. Even more clearly, the specification language **“the user will not be penalized for the time the questions are not available”** corresponds to claim 1 language “the user will not be penalized for the time that questions are not available”

**verbatim.**

Applicants cannot fail to note this portion of the claims so evidently and precisely enabled by the specification is also the same portion of the claims for which the Examiner has relied on official notice. Per MPEP 2144.03, Applicants thus traverse such taking of official notice as improper as lacking sufficient documentary evidence. Citation of a post-dated alleged prior art reference by the Examiner is erroneous not only for the obviousness rejection presented, but also as grounds for taking official notice that the claimed feature is of such notorious character as capable of instant and unquestionable demonstration as to defy dispute. See *In re Zurko*, 258 F.3d at 1386, 59 USPQ2d at 1697; *In re Ahlert*, 424 F.2d at 1092, 165 USPQ 421. Applicants also note that, regardless of the disputed post-facto nature of Ashley, the Ashley reference fails to teach or suggest not penalizing the user for the time that questions are not available during a test session restoration.

As previously noted during prosecution, in contrast to embodiments of the present invention, Kershaw's user's responses are not saved at the same time they are received but instead are stored on disk and only eventually transferred for scoring. See column 8 lines 50-55 of Kershaw for example, "The examinee's responses to questions presented by the test are preferably stored on the hard disk on each workstation 3 and are later preferably backed up by the administrator and transferred to the central processing site 1 for scoring and evaluation." Kershaw keeps a single examinee performance file per test session (Table 8) and can update log records to a file when a user answers a question (column 41 line 54: "When the examinee responds to an item and moves to the next screen, data is written to an end item event log record."). Kershaw's examinee performance records are however apparently not reported in real

time, but only as part of an “end of day process” when workstations are shut down (see column 70 line 2 and column 72 lines 20-56 for example).

In contrast, the embodiments of the present invention instead may immediately transmit recorded user actions; see for example Figure 2 step 245 and paragraph [0039] **“The user interactions which may cause the state to be updated can be configured to meet the needs of a given examination and may include any interaction or only those which result in a response being made to the current test item being displayed. If the user interaction is one requiring the state to be updated, the testing station then transmits the changes to the state to the service center 245.”** This feature is distinct from the heartbeat timer of the present invention’s embodiments, which merely ensures that user interactions that are not ones which require the state to be updated are periodically transmitted (see Figure 2 step 230 and paragraph [0040] for example).

Lest an enablement assertion be presented on different subject matter, Applicants preemptively note the provisional application relied upon for priority also clearly teaches this distinctive feature. Page 10 lines 23-25 of the provisional application state **“Also, the test state is transmitted to the service center 120 whenever a user action is performed. A user action may include entering an answer. Therefore, the service center 120 is able to maintain a copy of the test state of the test being administered on the testing station.”** Page 11 lines 6-8 of the provisional application state **“In step 240, the testing station 130a transmits the test state to the service center 120 in response to detecting a user action.”** Page 11 lines 17-18 of the provisional application state **“In step 330, the service center 120 receives the test state upon detection of a user action.”** Page 12 lines 6-8 of the provisional application state **“As the**

test is being administered portions of the test are continually transmitted to the testing station 130a and stored in local volatile memory.” Figure 2 elements 230 and 240 recite, in order “DETECT USER ACTION” and, without delay or intervening action, “TRANSMIT TEST STATE”.

***Conclusion***

Therefore, all rejections having been addressed, it is respectfully submitted that the present application is in a condition for allowance and a Notice to that effect is earnestly solicited.

Should any issues remain unresolved, the Examiner is encouraged to contact the undersigned representative for Applicants at the telephone number indicated below in order to expeditiously resolve any remaining issues.

Respectfully submitted,  
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